No. 14-275

Supreme Court, U.S.
FILED
MAR 9 2015
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARVIN D. HORNE, *ET AL.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curaie

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

Library of Congress
Law Library

QUESTIONS PRESENTED

(1) Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

(2) Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

(3) Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The History of the Fifth Amendment Demonstrates that the Takings Clause Should be Applied to Personal, as Well as Real, Property. 2

II. There is No Principled Reason to Limit the Takings Clause to Real Property. 6

III. Petitioners Are Entitled to Just Compensation. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) i

Armstrong v. United States, 364 U.S. 40 (1960) 2

Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) 9

Brown v. Legal Found. Of Wash., 538 U.S. 216 (2003) 7

Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897) 4

First English Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 9

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984) 9

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) 9

Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) 7

Respublica v. Sparhawk, 1 Dall. 357 (Pa. 1788) 3

Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984) 7

Safford Uniform School District No. 1 v. Redding, 557 U.S. 364 (2009) 1

Schneider v. Cal. Dep't of Corr., 151 F.3d 1194 (9th Cir. 1998) 7

Snyder v. Phelps, 131 S. Ct. 1207 (2011) 1

United States v. General Motors Corp., 323 U.S. 373 (1945) 7

United States v. Russell, 80 U.S. 623 (1871) 6

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 7

Constitutional Provisions

U.S. CONST., amend. V ..... *passim*

Other Authorities

1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (The Lawbook Exchange, Inc. 2008) 5

1 WILLIAM BLACKSTONE, COMMENTARIES 6

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Cambridge, Mass. 1833) 10

BLACK'S LAW DICTIONARY (6th ed. 1990) 8

Eduardo M. Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227 (2004) 5, 6, 8, 9

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES (2d ed. 2002) 2

Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) 4, 5

John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) 4

Property, Nat'l Gazette, Mar. 27, 1792, in 14 J. MADISON, THE PAPERS OF JAMES MADISON (R. Rutland & T. Mason eds. 1983) 5

STEVEN J. EAGLE, REGULATORY TAKINGS (2d ed. 2001) 8

William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, (1985) 4

Rules

Sup. Ct. R. 37.6 1

Treatises

THOMPSON ON REAL PROPERTY § 14.03 (David A. Thomas ed., Supp. 1999) 8, 9

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)[2], and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free from uncompensated deprivations of personal property.

SUMMARY OF THE ARGUMENT

Reduced to its core, the issue that confronts this Court is simple: may this country's citizens be dispossessed of their private property by the

---

[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to the filing of *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

government without just (or, indeed, any) compensation?

Here, the basis for the taking of Petitioners' personal property without just compensation is a faulty premise that an individual's personal property is less sacrosanct than real property and is not subject to the protections of the Fifth Amendment's Takings Clause. Because there is no historical or principled basis for such a distinction between real and personal property, however, the Court should hold that both types of property are protected equally under the Takings Clause. To fail to do so would eviscerate the right of our nation's citizens to be secure in their possessions.

ARGUMENT

I. The History of the Fifth Amendment Demonstrates that the Takings Clause Should be Applied to Personal, as Well as Real, Property.

In pertinent part, the Fifth Amendment provides that "[n]or shall private property be taken for public use, without just compensation." U.S. CONST., amend. V. A principal purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Accordingly, it is well-established that "[t]he takings clause is the most important protection of property rights in the Constitution." ERWIN CHEMERINSKY,

CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 616 (2d ed. 2002).

Despite the importance of property rights in the Anglo-American legal tradition, uncompensated takings were frequent in the revolutionary era. Significantly, these takings were not just of land, but also included takings of personal property for military use. *See, e.g.*, *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788) (denying compensation for seizure of goods). The following account of John Jay illustrates the resentment against government appropriation of private property to supply the army during the Revolutionary War, and demonstrates the Founders' commitment to the protection of personal property:

> I . take the Liberty of calling the Attention of my Countrymen to a Subject, which however important seems to have passed without due Notice; I mean the Practice of impressing Horses, Teems, and Carriages by the military . . without any Authority from the Law of the Land.
>
> * * *
>
> . . . The Time may come when Law and Justice will again pervade the State, and many who now severely feel this kind of oppression, may then bring Actions and recover Damages. This is true Doctrine, however questionable the Policy of declaring it at this Time may be.

John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987).

Against a background of such abuses, the Takings Clause was designed to protect both real and personal property, and reflected the liberalism of its primary author, James Madison. Along with the rest of the Fifth Amendment, the Takings Clause became effective on December 15, 1791, and its significance is illustrated by the fact that it was the first provision of the Bill of Rights to be applied to the states. *See Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). Professor Treanor notes that "Madison's rationale for the Bill of Rights suggests two reasons for his proposal of the just compensation clause. First, the clause would explicitly bar the uncompensated taking by the national government of ***chattel*** and real property . . . ." William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710-11 (1985) (emphasis added). Similarly, Professor Rubenfeld argues that "the appropriation of private, and, presumably, personal, property to supply the army during the Revolutionary War" numbered among the "paradigm[atic] case[s]" of governmental wrongdoing that the Founders sought to remedy through the Takings Clause. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1993).

Such an understanding is in harmony with Madison's own writings. In his essay *Property*, Madison argued that the federal government had committed to the proposition that "no land or merchandize" "shall be taken *directly* even for public

use without indemnification to the owner." *Property*, Nat'l Gazette, Mar. 27, 1792, in 14 J. MADISON, THE PAPERS OF JAMES MADISON 266-67 (R. Rutland & T. Mason eds. 1983). Likewise, Henry St. George Tucker, writing shortly after the ratification of the Takings Clause, stated that the purpose of the clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by Impressment, as was too frequently practiced during the revolutionary war, without any compensation whatsoever." 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 305-06 (The Lawbook Exchange, Inc. 2008).

Not only does this undercut any argument that real property is somehow more deserving of protection under the Takings Clause, but it seems likely that the Founders were more concerned with the taking of personal property by troops than the taking of real property by the government. Indeed, as Professor Peñalver has concluded, "it seems unlikely that the uncompensated taking of personal property was somehow less offensive to the Framers than the uncompensated taking of land." Eduardo M. Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 249 (2004).

In this respect, the Takings Clause is in harmony with its English antecedents, specifically Magna Carta. As Professor Rubenfeld explains, "the Compensation Clause is also a descendant of Magna Carta, which provided that the King could not 'take grain or other chattels or any one without immediate payment therefore in money.'" Rubenfeld, *Usings*, 102 YALE L.J. at 1123 n.205 (citing Magna Carta ch.

28, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 8, 11 (1971)). Such an understanding chimes with the commentaries of William Blackstone, who defined property rights as consisting of "the free use, enjoyment, and disposal of all his acquisitions, without any control of diminution, save only by the laws of the land." 1 WILLIAM BLACKSTONE, COMMENTARIES 134.

Put simply, therefore, "the original understanding of the Takings Clause offers no support for a distinction between personal property and land in takings law." Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. at 250. As such, any reading of the Takings Clause that allows an individual's personal property to be subject to uncompensated takings is an affront to its original understanding and purpose.

II. There is No Principled Reason to Limit the Takings Clause to Real Property.

Despite the historical support that the Takings Clause was designed to protect personal property, courts have frequently afforded real property far more protection than personal property. Such decisions, however, cut against this Court's earliest Takings Clause precedent. In *United States v. Russell*, 80 U.S. 623 (1871), the Court held that the federal government was obliged to pay compensation for steamships confiscated as part of the Civil War effort. *Id.* at 630 ("Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats . . . ."). By way of further

illustration and more recently, in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), the Court stated that "property" as used in the Takings Clause refers to the entire "group of rights inhering in the citizen's [ownership]" and was not limited to the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises right recognized by law. [Instead it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* at 378. Even more recently, the Court has determined that forms of property other than tangible property are protected under the Takings Clause. *See, e.g.*, *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (holding that trade secrets are property).

Here, Petitioners' property interest in the raisins they sell to support themselves is at least as great as the other forms of property that this Court and various Courts of Appeal have held are protected under the Takings Clause. *See, e.g.*, *Brown v. Legal Found. Of Wash.*, 538 U.S. 216 (2003) (relating to interest from IOLTA accounts); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (relating to interest earned on an interpleader fund); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194 (9th Cir. 1998) (relating to interest from inmate funds placed in trust); *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (holding that "taking" of presidential papers requires just compensation). Consequently, the "implication the 'personal property' should have less protection than land under regulatory takings doctrine flies in the

face of long precedent that both tangible and intangible personalty are as subject to condemnation as realty." STEVEN J. EAGLE, REGULATORY TAKINGS 88 (2d ed. 2001). Professor Peñalver likewise concludes that "the distinction finds no support in the plain text of the Constitution. The Fifth Amendment protects 'private property,' but does not distinguish between personal property and land." Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. at 246.

Indeed, properly read, any reading of the Takings Clause must, by definition, include the personal property of Petitioners. The Framers could have limited the word "property" to real property when drafting the Fifth Amendment but did not do so. Consequently, "[t]he term 'property,' when used in its most comprehensive sense, will include both real and personal property, unless restricted in its meaning by the context.'" THOMPSON ON REAL PROPERTY § 14.03, at 184 (David A. Thomas ed., Supp. 1999). Such an understanding is far from remarkable, as demonstrated by the Black's Law dictionary definition: "That which is peculiar or proper to any person; that which belongs exclusively to one." It includes "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which foes to make up wealth or estate." BLACK'S LAW DICTIONARY 1216 (6th ed. 1990) (defining "property"). Without any limiting adjective, therefore, the use of the term "property" in the Takings Clause should be read expansively to include personal property.

Perhaps the justification for the differential treatment of real and personal property is based on

outdated concepts of the significance of real property. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("[T]he 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law . . . ."). Whatever the merits of this, "[i]t is important . . . to keep in mind that [the distinction between land and personal property is] traceable to conditions no longer existing in England, and which never had any existence in this country." THOMPSON ON REAL PROPERTY § 14.03, at 182. As such, "[t]o the extent that this conclusion conflicts with vague intuitions about the primacy of property in land, those intuitions are most likely rooted in cultural assumptions based on outmoded notions of the ways in which most people use land." Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. at 286.

III. Petitioners Are Entitled to Just Compensation.

Once it is established that the taking of Petitioners' personal property is fully protected under the Takings Clause, just compensation must follow. This Court has recognized that "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong*, 364 U.S. at 49). This is measured by the market value to Petitioners at the time of the takings. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984); *see also Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (measure of compensation is

"what has the owner lost, not what has the taker gained.") (Holmes, J.). Only by doing so can there be "an affirmance of a great doctrine established by the common law for the protection of private property." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (Cambridge, Mass. 1833).

CONCLUSION

The history and original purpose of the Takings Clause, as well as modern concepts and expectations of property rights, compels the conclusion that the clause properly extends to Petitioners' personal property. As such, for the reasons set forth above, this Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, Virginia 22901
(434) 978-3888
Counsel for Amicus Curiae